No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

UNITED STATES OF AMERICA, Petitioner,

v.

CHAMBERLAIN WHOLESALE GROCERY COMPANY and W. G. COZARD, WALTER NEUGEBAUER and MARIE NEUGEBAUER, WILLIAM R. ELLIS and ESTHER ELLIS, and ANDREW REIS and MILLIE REIS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS

Chamberlain Wholesale Grocery Company and W. G. Cozard in Opposition.

OPINION BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals is reported at 226 F. 2d 492.

JURISDICTION.

The judgment of the Court of Appeals was entered November 2, 1955 (Pet. 16a). The petition for a writ of certiorari was filed January 30, 1956. The jurisdiction of this Court is invoked by appellants under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Where the trial court, acting pursuant to Rule 71 A (h) of the Federal Rules of Civil Procedure and under the facts in these particular cases referred these Federal condemnation proceedings to Commissioners, were such references under the facts existent in these cases within the discretion of the District Court under Rule 71 A (h)?

RULE INVOLVED.

Rule 71 A (h) of the Federal Rules of Civil Procedure.

STATEMENT.

These cases are condemnation actions for the acquisition of land required by the United States on account of the construction of the Fort Randall Dam in the Missouri River at a point approximately six miles south of Lake Andes, South Dakota. The Fort Randall Dam is one of the projects authorized by the Act of Congress of December 22, 1944, and involves the taking of approximately 125 to 150 miles of the Missouri River bottom land in the State of South Dakota. Many tracts required on account of the Fort Randall Dam have been acquired in condemnation and as to many of them agreement was not reached with the landowners and trial on the issue of compensation became necessary.

In each of these cases following affidavits being filed by both sides, the District Court ordered a reference to a Commission and following Commission hearings the District Court consisting of a different Judge entered judgments based on the Commission findings.

ARGUMENT.

Appellants indicate that the Tenth Circuit interpretation of Rule 71 A (h) is materially different and contrary to the view of the Eighth Circuit expressed in the opinion below. Two cases from the Tenth Circuit are cited by appellants, namely United States v. Theimer, 199 F. 2d 501 and United States v. Waymire, 202 F. 2d 550. As a matter of fact this question has been presented three times in the Tenth Circuit, the first time being in October, 1952, in the case of United States v. Theimer, which involved the condemnation of a 171-acre tract for airport use and an easement over two other tracts of 12 acres and 1 acre respectively lying adjacent to the airport. The Court held in that case that none of the factors specifically set out in the rule warranting the Judge in taking the case from a jury, were there present. As the Court stated "The motion for the appointment of a Commission did not set out any extraordinary facts or circumstances warranting these proceedings. It gave as reason for the request only their desire 'to remove all obstacles that cause delay and to bring the action to a conclusion.'" They stated further that "The Trial Court made no statement or finding of fact as to what prompted it to conclude that the interest of justice demanded the invocation of the extraordinary rather than to permit the ordinary procedure contemplated by the rule."

In the case of United States v. Wallace, 201 F. 2d 65 and United States v. Waymire, 202 F. 2d 550, the United States Court of Appeals for the Tenth Circuit in each case affirmed the decision of the Court below appointing Commissioners and in each case indicated that there were facts within the cases to support the exercise of discretion by the District Court which discretion was specifically admitted by the Court of Appeals to exist in the United

States v. Theimer case, even though there improperly exercised.

In the instant cases the United States Court of Appeals for the Eighth Circuit states in the last paragraph of the decision "The showing made by each of the landowners and the findings thereon in the Court afforded sufficient basis for the Court's orders."

In each of these cases facts were presented to the District Court in the affidavit sufficient to justify the exercise of discretion and the reference to the Commission.

On page 13a of the appendix in appellant's brief the Court below cites the supplemental report of the Advisory Committee to the Supreme Court of March, 1951, as reported in 28 U. S. C. A. pocket part and quotes therefrom, including footnote one, which is set out at the bottom of said page 13a. The Judicial Conference referred to on page 6 of appellant's brief was after the appointment of Commissioners was made in the instant cases and has no application here.

The Missouri River program is larger than the TVA. Just as the discretion existed in the Court in the cases of United States v. Waymire and United States v. Wallace to refer those matters to a Commission under the rule so did the facts in each case here justify such reference, and in addition to the unusual and extraordinary facts set forth in each of those individual cases, we have the additional fact that a large project like the TVA is here involved, bringing us squarely within the wording of the report.

It seems that appellants, instead of pointing out a conflict between the two Circuits are actually trying to maintain a position contrary to that of either Circuit and instead of petitioning this Court for a writ of certiorari should again request a change in the wording of Rule 71 A

(h) or else adjust their position in accordance therewith. Both the Tenth Circuit and the Eighth Circuit decisions are in accordance with the wording of Rule 71 A (h).

The appellants state (page 9 of their brief): "There are increasing indications of resort by District Judges to the Commission in run-of-the-mill cases." The present cases are not run-of-the-mill cases and the Courts below have so found. Appellants will undoubtedly continue to find the Courts in agreement with their position in the ordinary cases, that is, in cases which are not a part of a huge project like TVA and which are without the extraordinary features here involved.

CONCLUSION.

For the foregoing reasons we respectfully submit that the petition for writ of certiorari should be denied.

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